

BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD  
CENTRAL PUGET SOUND REGION  
STATE OF WASHINGTON

ELIZABETH MOONEY AND JANET HAYS,

Petitioners,

and

ANN HURST,

Intervenor,

v.

CITY OF KENMORE AND WASHINGTON  
STATE DEPARTMENT OF ECOLOGY,

Respondents.

**CASE NO. 12-3-0004**

*(Mooney)*

**FINAL DECISION AND ORDER**

**SYNOPSIS**

The City of Kenmore adopted Ordinance 12-0334, and Washington State Department of Ecology (Ecology) approved the adoption, which together with Ordinance 10-0312 updated the City's Shoreline Master Program (SMP). Citizens challenged the SMP for non-compliance with the Shoreline Management Act (SMA) and the applicable guidelines. The Petitioners asserted that the City's SMP failed to enact adequate provisions to protect ecological functions of the downtown shoreline in light of a dredge report finding high levels of dioxins in sediment below a downtown waterfront property, along with other evidence of industrial contamination.

The Board found Kenmore's SMP inventory documented existing contamination of the downtown waterways and shorelines, and Kenmore's SMP policies, development regulations, and restoration plan provided the necessary response. The Board concluded

1 Petitioners failed to meet their burden of providing clear and convincing evidence that  
2 Ecology's approval of the SMP was non-compliant with the policy of RCW 90.58.020 and  
3 the applicable guidelines.

#### 4 5 **I. PROCEDURAL BACKGROUND**

6 Petitioners Elizabeth Mooney and Janet Hays and Intervenor Ann Hurst are citizens who  
7 oppose the City's adoption and Ecology's approval of Kenmore's SMP update because it  
8 allows continued industrial use of the Downtown Waterfront and fails to take adequate  
9 consideration of environmental contamination. Pursuant to RCW 90.58.190, petitioners  
10 appealed to the GMHB.

11  
12 At the outset, the Board granted extensions to allow the parties opportunity to negotiate  
13 disputes concerning the record. The Board issued its Order on Motions to Supplement the  
14 Record on December 10, 2012.

15  
16 The parties subsequently filed prehearing briefs and exhibits as follows:<sup>1</sup>

- 17  
18
  - 19 • Petitioners' Prehearing Brief, December 18, 2012;
  - 20 • Intervenor Ann Hurst's Prehearing Brief with Exhibits, December 18, 2012;
  - 21 • Respondent City of Kenmore's Pre-hearing Brief, January 3, 2013;
  - 22 • Respondent Washington State Department of Ecology's Prehearing Brief, January 3, 2013;
  - 23 • Petitioners' Reply Brief, January 10, 2013;
  - 24 • Intervenor Reply to City of Kenmore and Washington State Department of Ecology's Prehearing Briefs, January 10, 2012.

25 The Hearing on the Merits was convened January 16, 2013, at Kenmore City Hall. Present  
26 for the Board were Margaret Pageler, presiding officer, Cheryl Pflug, and Nina Carter.  
27 Petitioners appeared by their attorney Aaron Smith. Petitioners Elizabeth Mooney, Janet  
28 Hays, and Intervenor Ann Hurst attended in person, accompanied by other concerned  
29 citizens. The City appeared by its attorney Dawn Reitan of Inslee, Best, Doezie & Ryder,  
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<sup>1</sup> The City and Ecology generally coordinated their briefing, adopting portions of each other's briefs by reference to avoid duplication.

1 P.S., with Mayor David Baker, City Director of Community Development Debbie Bent,  
2 Senior Planner Lauri Anderson, and Building Official Bryan Hampson also in attendance.  
3 Ecology was represented by Assistant Attorney General Phyllis J. Barney. Kathleen  
4 Hamilton of Buell Realtime Reporting provided court reporting services.  
5

6 The hearing provided the Board an opportunity to ask questions clarifying important facts in  
7 the case and providing better understanding of the legal arguments of the parties.  
8

## 9 10 **II. JURISDICTION AND STANDARD OF REVIEW**

### 11 **A. Board Jurisdiction**

12 The Board finds that the Petition for Review was timely filed pursuant to RCW 36.70A.290(2)  
13 and RCW 90.58.190(2). The Board finds that Petitioners have standing to appear before the  
14 Board, pursuant to RCW 36.70A.280(2). The Growth Management Act gives the Board  
15 jurisdiction to review adoption and approval of Shoreline Master Programs to determine  
16 whether they are in compliance with the Shoreline Management Act. RCW 36.70A.280(1)(a).  
17 The Board finds that it has jurisdiction over the subject matter of the petition pursuant to  
18 RCW 36.70A.280(1)(a).  
19

### 20 **B. Burden of Proof and Standard of Review**

21  
22 Appeals of SMPs are governed by the Shoreline Management Act (SMA). RCW 90.58.190.  
23 The appellant has the burden of proof in an appeal of an SMP. RCW 90.58.190(2)(d).  
24

25 The Shoreline Management Act differentiates “shorelines” and “shorelines of statewide  
26 significance.”<sup>2</sup> The scope and standard of GMHB review for **shorelines** is set forth in RCW  
27 90.58.190(2)(b), which provides:  
28

29 If the appeal to the growth management hearings board concerns shorelines,  
30 the growth management hearings board shall review the proposed master  
31 program or amendment solely for compliance with the requirements of this  
32 chapter, the policy of RCW 90.58.020 and the applicable guidelines, the internal

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<sup>2</sup> Defined at RCW 90.58.030(2)(e) and (f) respectively.

consistency provisions of RCW 36.70A.070, 36.70A.040(4), 35.63.125, and 35A.63.105, and chapter 43.21C RCW as it relates to the adoption of master programs and amendments under chapter 90.58 RCW.

For appeals concerning **shorelines of statewide significance**, RCW 90.58.190(2)(c) provides:

If the appeal to the growth management hearings board concerns a shoreline of statewide significance, the board shall uphold the decision by the department unless the board, by clear and convincing evidence, determines that the decision of the department is inconsistent with the policy of RCW 90.58.020 and the applicable guidelines.

Under these two different subsections of RCW 90.58.190(2), the scope and standard of review by the Growth Management Hearings Board differ based on whether the appeal concerns “shorelines” or concerns “shorelines of statewide significance.”<sup>3</sup>

To the extent the appeal concerns “shorelines” – i.e., those not of statewide significance – the “board shall find compliance unless it determines that the action by the state agency, county, or city is clearly erroneous in view of the entire record before the board and in light of the goals and requirements of the [GMA].” RCW 36.70A.320(3). To find an action clearly erroneous, the Board must be “left with the firm and definite conviction that a mistake has been committed.”<sup>4</sup> In this appeal, the reach of the Sammamish River in Kenmore’s Downtown Waterfront is a “shoreline,” but not a shoreline of statewide significance.<sup>5</sup>

The shores of Lake Washington, including the portion in the Kenmore Downtown Waterfront, are shorelines of statewide significance. When an appeal concerns a shoreline of statewide

<sup>3</sup> None of the participants have provided the Board with any authorities addressing the application of these differing scopes and standards when the appeal includes both “shorelines” and “shorelines of statewide significance,” as in the present matter.

<sup>4</sup> *Lewis County v. WWGMHB (“Lewis County”)*, 157 Wn.2d 488, 497-98, 139 P.3d 1096 (2006) (citing to *Dept. of Ecology v. PUD District No. 1 of Jefferson County*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993)); *See also*, *Swinomish Tribe, et al. v. WWGMHB*, 161 Wn.2d 415, 423-24, 166 P.3d 1198 (2007).

<sup>5</sup> Petitioners’ appeal concerns “information not included in the inventory specifically concerning Lake Washington.” Petitioners’ Prehearing Brief at 3. They limit their argument to the designated Downtown Waterfront Environment, which includes shores of Lake Washington and the north shore of the Sammamish River. *Id.* at 4.

1 significance, Ecology's decision to approve the SMP will be upheld "unless the board, by  
2 clear and convincing evidence, determines that the decision of the department [Ecology] is  
3 noncompliant with the policy of RCW 90.58.020 or the applicable guidelines . . . ." RCW  
4 90.58.190(2)(c). As the Board explained in *Confederated Tribes & Bands of the Yakama*  
5 *Nation v. Yakima County*,<sup>6</sup> the Legislature has "narrowed the scope" of review and  
6 "prescribed a high evidentiary standard" of "clear and convincing evidence" when an appeal  
7 concerns a shoreline of statewide significance. Clear and convincing evidence "requires  
8 that the trier of fact be convinced that the fact in issue is 'highly probable,'" which means  
9 "clear, positive and unequivocal in [its] implication." *Colonial Imports, Inc. v. Carlton*  
10 *Northwest, Inc.*, 121 Wn.2d 726, 735, 853 P.2d 913 (1993) (internal citations omitted).<sup>7</sup> This  
11 high evidentiary standard is consistent with "the enhanced protection of the statewide  
12 interest over the local interest" when a shoreline of statewide significance is at issue.<sup>8</sup>  
13  
14

15 RCW 90.58.190(2) also limits the scope of the Board's review of a Shoreline Master  
16 Program. SMP provisions concerning "shorelines of statewide significance" are reviewed  
17 solely to determine whether Ecology's decision approving the SMP "is noncompliant with  
18 the policy of RCW 90.58.020 or the applicable guidelines . . . ." RCW 90.58.190(2)(c).  
19 Board review of SMP provisions concerning "shorelines" must also determine compliance  
20 with SMA requirements, with SEPA procedures, and with "the internal consistency  
21 provisions of RCW 36.70A.070 [and] RCW 36.70A.040(4)." RCW 90.58.190(2)(b).  
22  
23

24 Pursuant to RCW 90.58.060(1), Ecology has adopted guidelines to assist jurisdictions in  
25 the development of their SMPs (the guidelines). Deference to Ecology's interpretation of  
26 the guidelines is appropriate because WAC 173-26 is Ecology's own regulation. *Postema*  
27 *v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 86, 11 P.3d 726 (2000).  
28  
29

30 <sup>6</sup> EWGMHB 10-1-0011, Final Decision and Order (Apr. 4, 2011), at 4.

31 <sup>7</sup> See also, *Aluminum Co. of Am. v. Aetna Cas. & Sur. Co.*, 140 Wn.2d 517, 531, 998 P.2d 856 (2000) (The  
32 clear and convincing standard requires evidence "so clear, direct, weighty, and convincing as to enable the  
jury to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue.")

<sup>8</sup> *Yakama Nation*, EWGMHB 10-1-0011, at 4 n.8.

### III. PRELIMINARY MATTERS

#### A. Petitioners' Motion to Supplement the Record

With their Reply Brief, Petitioners moved to supplement the record with three scientific documents concerning dioxins:

1. Tuxen, Linda, EPA Information Sheet 1, *Dioxin: Summary of the Dioxin Reassessment Science*, 10/15/2004. Document provides summary concerning toxicity of Dioxin and means of exposure.
2. Gullett and Touati, *PCDD/F Emissions from Forest Fire Simulations*, Atmospheric Environment 37 (2003) 803-813. Document determines dioxins are created from burning biomass including trees.
3. Ryan, Wikstrom, Gullett and Touati, *Investigation of the Pathways to PCDDs/Fs from an Ethylene Diffusion Flame: Formation from Soot and Aromatics*, Organohalogen Compounds, Vol. 66 (2004) 1119-1125. Document determines that fly ash is a potential source for the creation of dioxins.

Petitioners assert the documents present well-settled science that may be helpful to the Board in understanding the sources and unique qualities of dioxins. Respondents did not object to the supplementation.

The Board notes its rules concerning supplementation set an early deadline for such motions but provide: "The board may allow a later motion for supplementation on rebuttal or for other good cause shown."<sup>9</sup>

The Board allows Petitioners' late motion for supplementation on rebuttal. The Board finds the documents assist the Board in understanding the Petitioners' issues, including the relationship between the industrial history of the Kenmore Downtown Waterfront and the risks associated with dioxin contamination in the environment. The motion to supplement the record is **granted** and the documents are **admitted**.

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<sup>9</sup> WAC 242-03-565(1).

1 The Board's Order on Motions to Supplement the Record (December 10, 2012) indicated  
2 several scientific studies "may be offered." Petitioners' Reply cites to Meador, J.P., et al.,  
3 *Use of tissue and sediment-based threshold concentrations of PCBs to protect salmonids*  
4 *listed under the US Endangered Species Act* (2002) and Meador, J.P., et al.,  
5 *Bioaccumulation of PCBs in juvenile Chinook salmon outmigration through a contaminated*  
6 *urban estuary* (2010). These documents are also **admitted**.

### 8 **B. Abandoned Issues**

9 The Board's Rules of Practice and Procedure provide: "Failure by [a petitioner] to brief an  
10 issue shall constitute abandonment of the unbriefed issue."<sup>10</sup> Also, the Board has stated,  
11 "Inadequately briefed issues would be considered in a manner similar to consideration of  
12 unbriefed issues and, therefore, should be deemed abandoned."<sup>11</sup> Further, the Board has  
13 held, "An issue is briefed when legal argument is provided; it is not sufficient for a petitioner  
14 to make conclusory statements, without explaining how, as the law applies to the facts  
15 before the Board, a local government has failed to comply with the Act."<sup>12</sup>

16 Neither Petitioners nor Intervenor made arguments in their Prehearing Briefs concerning  
17 Legal Issue 1.<sup>13</sup> Legal Issue 1 is deemed **abandoned** and is **dismissed**.

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23  
24 <sup>10</sup> WAC 242-03-590(1).

25 <sup>11</sup> *Sky Valley, et al., v. Snohomish County*, CPSGMHB Case No. 95-3-0068c, Order on Motions to Reconsider  
and Correct (Apr. 15, 1996), at 3.

26 <sup>12</sup> *Tulalip Tribes of Washington v. Snohomish County*, CPSGMHB Case No. 96-3-0029, Final Decision and  
27 Order (Jan. 8, 1997), at 7; *TS Holdings v. Pierce County*, CPSGMHB Case No. 08-3-0001, Final Decision and  
Order (Sep. 2, 2008), at 7-8.

28 <sup>13</sup> Legal Issue 1: *Commercial and Industrial Uses*. Does the updated Kenmore Shoreline Master Program, as  
29 adopted by Ordinance 12-0334 and approved by Ecology with its March 16, 2012 letter, fail to provide for  
30 adequate policies and regulations to protect, preserve, and restore the ecological functions and processes of  
31 Kenmore's shorelines as required by the Shoreline Management Act, RCW 90.58.020, 90.58.090, and  
32 90.58.100(1), the Shoreline Master Program Guidelines, WAC 173-26-186(8), 173-26-201(2), 173-26-201(3),  
173-26-221(2), 173-26-241(3)(d) and (f), and 173-26-251, and the Growth Management Act, RCW  
36.70A.020(10), 36.70A.060, 36.70A.172, and 36.70A.480, so as to preclude no net loss of the ecological  
functions and processes of the shoreline when it promotes and facilitates the development of fragile shoreline  
environments with commercial, industrial, and/or manufacturing uses?

Neither Petitioners nor Intervenor briefed questions of compliance with the Growth Management Act or with the GMA provisions cited in Legal Issues 2, 3, and 4. Issues of non-compliance with GMA provisions are deemed **abandoned** and are **dismissed**.

### C. Order of Discussion

The Board first provides a statement of facts and then addresses the legal issues under three questions:

- Is there clear and convincing evidence that Kenmore's SMP inventory was not complete because it did not include the October 6, 2011 Harbour Village Marina dredge report or other indicia of the extent of toxins in the shoreline environment? Legal Issue 2
- Is there clear and convincing evidence that allowance of continued industrial and high-intensity use violates the "no net loss," "optimum implementation," and restoration planning requirements of the SMA, given the presence of dioxins and other contaminants in the Downtown Waterfront? Legal Issues 5 and 3
- Is there clear and convincing evidence that Kenmore's SMP fails to protect critical habitat, public access, and public health and safety, given the new evidence of contamination in the Downtown Waterfront? Legal Issues 4, 6 and 7

### IV. STATEMENT OF FACTS

The Board makes the following findings of fact:<sup>14</sup>

The City of Kenmore is situated at the northeast end of Lake Washington, where the Sammamish River flows into the Lake. Historically, water-related industrial uses including lumber mills and cement plants located here.<sup>15</sup> Kenmore Pre-Mix still operates, relying on barge access for delivery of raw materials.<sup>16</sup> The Kenmore Air Harbor, marinas, boat building and repair, and other water-dependent transportation uses continue, including,

<sup>14</sup> Documents in the record are referred to by their index numbers. An 'E' prefix indicates Ecology's index. A 'C' prefix indicates the City's index.

<sup>15</sup> E527, Inventory, at G-18, G-55.

<sup>16</sup> *Id.* at G-60.



1 most recently, Waterfront Construction, an assembly operation for components of the  
2 Highway 520 floating bridge.<sup>17</sup>

3  
4 Kenmore's SMP designates as "Downtown Waterfront" two shoreline reaches – LAKE-WA-  
5 03 and SAMM-RV-01 (north shore only). The Downtown Waterfront Shoreline Environment  
6 encompasses 1.4 miles of waterfront and approximately 57 acres.<sup>18</sup> There are no  
7 undeveloped parcels in these two reaches; however, some parcels with previous industrial  
8 uses are currently vacant.<sup>19</sup> The Lake Washington reach in the Downtown Waterfront  
9 designation is referred to as the Navigation Channel, is heavily industrialized, and is a  
10 "shoreline of statewide significance."<sup>20</sup> The Sammamish River north shore in the Downtown  
11 Waterfront designation is not a shoreline of statewide significance and is less  
12 industrialized.<sup>21</sup>

13  
14  
15 Kenmore's SMP designates Lake Washington and Sammamish River lands below the  
16 ordinary high water mark (OHWM) as "Aquatic Shoreline Environment."<sup>22</sup>

17  
18 Past industrial practices have left a legacy of contamination in both the Downtown  
19 Waterfront and Aquatic environments. Contaminants of concern include phosphorus, PCBs,  
20 PAHs, metals and dioxins.<sup>23</sup> These contaminants are predominately found in the sediments  
21 of polluted waterways.<sup>24</sup> When sediments are disturbed, pollutants are re-suspended in the  
22 water column where they are ingested by aquatic organisms. The toxins of primary concern  
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27 <sup>17</sup> *Id.* at G-59-60.

28 <sup>18</sup> *Id.* at G-40 and G-64..

29 <sup>19</sup> *Id.* E528, Cumulative Analysis at 10-11.

30 <sup>20</sup> WAC 173-20-370(3).

31 <sup>21</sup> WAC 173-18-210(48).

32 <sup>22</sup> E546, *Ex. 1*, Shoreline Sub-Element, at 10.

<sup>23</sup> E527, Inventory, at G-48 (PCBs at Lake Washington Kenmore Station); G-60 (diesel, heavy oil, arsenic, lead and barium present at LakePointe site in soil and groundwater); G-71-72 (arsenic at Sammamish River Kenmore Station related to industrial sources; phthalates and other contaminants also detected).

<sup>24</sup> Tuxen, Linda, EPA Information Sheet 1, *Dioxin: Summary of the Dioxin Reassessment Science*, 10/15/2004.

1 are bio-accumulative, that is, as creatures higher in the food chain (salmon, birds, humans)  
2 consume affected organisms, the toxic substances accumulate.<sup>25</sup>

3  
4 A landfill was formerly operated on a Downtown Waterfront site now proposed for the  
5 LakePointe mixed-use development.<sup>26</sup> This 50-acre property fronts both the Lake  
6 Washington reach and the Sammamish River and is currently used by Kenmore Pre-Mix  
7 and Waterfront Construction – both water-dependent uses. Pollution on this site led to a  
8 Remediation Investigation/Feasibility Study (RI/FS) in 2001<sup>27</sup> and a negotiated remediation  
9 agreement with Ecology under the Model Toxics Control Act (MTCA) requiring restoration  
10 as a condition of future redevelopment. No restoration has been undertaken on the site  
11 because redevelopment has not been started.  
12

13  
14 Lake Washington is designated as critical habitat for Chinook salmon and bull trout.<sup>28</sup>  
15 Sammamish River Reach 1 is designated critical habitat for Chinook and also supports  
16 other salmon and trout species.<sup>29</sup> The lakefront and river also provide priority habitats for  
17 bald eagles and great blue heron.  
18

19 Kenmore began its process to update its SMP in December 2007.<sup>30</sup> From 2007 to 2010, the  
20 City's Planning Commission reviewed and revised a number of key documents:

- 21 1) a shoreline inventory and analysis, E527;
- 22 2) a new sub-element of the Comprehensive Plan relating to shoreline master
- 23 program policies, E546, Ex. 1;
- 24 3) shoreline development regulations, E545;
- 25 4) a restoration plan, E546, Ex. 3;
- 26 5) a public access planning memorandum, E526;
- 27
- 28

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29 <sup>25</sup> See, e.g., Meador, J.P., et al., *Bioaccumulation of PCBs in juvenile Chinook salmon outmigration through a*  
30 *contaminated urban estuary* (2010).

31 <sup>26</sup> E527, Inventory, at G-60.

32 <sup>27</sup> *Supp. Ex. 4.*

<sup>28</sup> E527, Inventory, at G-40.

<sup>29</sup> *Id.* at G-72-73.

<sup>30</sup> C3.

- 1           6) a cumulative impacts analysis, E528;  
2           7) a matrix response to public comments.<sup>31</sup>

3  
4 During this process, opportunities were provided for public comment. Mss Mooney, Hays,  
5 and Hurst all provided testimony or comment, raising concerns about the contamination of  
6 properties and sediments in the Downtown Waterfront.<sup>32</sup>

7  
8 On September 13, 2010, the City Council passed Ordinance No. 10-0312, which adopted  
9 the City's shoreline sub-element policies and restoration plan,<sup>33</sup> and Ordinance No. 10-  
10 0313, which adopted the City's shoreline regulations. The City's proposed SMP Update  
11 consisted of the two ordinances, which were submitted to Ecology for its review as required  
12 under the SMA.<sup>34</sup>

13  
14 Ecology received Kenmore's SMP submittal package on November 5, 2010.<sup>35</sup> The initial  
15 submittal was incomplete,<sup>36</sup> however, and Kenmore provided additional information. On  
16 February 11, 2011, Ecology notified Kenmore that the SMP submittal was complete and that  
17 Ecology's review was commencing.<sup>37</sup> As required by the SMA as part of Ecology's formal  
18 SMP review, Ecology held a public hearing on the SMP. Again Mss. Mooney, Hays and  
19 Hurst provided comment, either in oral or written testimony, submitting graphic evidence of  
20 contamination in Kenmore's Downtown Waterfront.<sup>38</sup> Ecology submitted the comments  
21 received to Kenmore on April 25, 2011, and the City responded on May 3, 2011.  
22  
23  
24  
25  
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27 <sup>31</sup> C172 at 3.

28 <sup>32</sup> C121, C164, C185, C187, C191, C 206.

29 <sup>33</sup> E546, Ord. 10-0312.

30 <sup>34</sup> WAC 173-26-110.

31 <sup>35</sup> E599, at 2, summarizes Ecology's review process.

32 <sup>36</sup> C313.

<sup>37</sup> C320.

<sup>38</sup> E 514, E 700, E 701, E 712, E 734, E 737, E 738, E 739, E 746, E 748, E 828, E 832, E 833, E 837, E 838,  
E 842, E 843, E 844, E 845, E 846. Petitioners do not challenge the City's or Ecology's public participation  
processes.

1 Meanwhile, in a separate action in 2011, owners of the Harbour Village Marina on  
2 Kenmore's Lake Washington shoreline in the Downtown Waterfront sought a dredging  
3 permit for replacement of piers. A Memorandum for Record dated October 6, 2011 (Dredge  
4 Report), discusses the characterization of sediment from Harbour Village Marina.<sup>39</sup> The  
5 Dredge Report describes testing on marina sediments conducted on June 7, 2011, to  
6 determine whether the sediment, which was proposed to be dredged, was suitable for open  
7 water disposal. The required analysis identified high levels of dioxins and PCBs in the  
8 sediment below the marina. The Dredge Report concluded that due to the presence of  
9 PCBs and dioxins above a threshold concentration, the sediment, if dredged, was  
10 unsuitable for open water disposal.  
11

12  
13 Following Ecology's review of Kenmore's SMP submittal, on July 25, 2011, Ecology issued  
14 Findings and Conclusions for Proposed Amendments to the City of Kenmore Shoreline  
15 Master Program ("Findings"), which conditioned approval of the City's SMP Update on the  
16 adoption of required amendments to the shoreline regulations adopted under Ordinance  
17 No. 10-0313.<sup>40</sup> Kenmore corresponded with Ecology on both the required and the  
18 suggested changes through the remainder of 2011, and on February 13, 2012, the  
19 Kenmore City Council adopted Ordinance 12-0334 revising and replacing Ordinance 10-  
20 0313.<sup>41</sup>  
21

22  
23 At the February 13, 2012 City Council meeting during which the revised SMP was adopted,  
24 Ms. Mooney submitted to the Council a copy of the October 6, 2011, Harbour Village  
25 Marina Dredge Report.<sup>42</sup> The report was made available to Ecology's SMP review office at  
26 about the same time.<sup>43</sup>  
27

28  
29  
30 <sup>39</sup> *Supp. Ex. 1a, b, and c.*

31 <sup>40</sup> C329. No changes were required for Ordinance 10-0312, adopting the shoreline sub-element policies and  
restoration plan.

32 <sup>41</sup> E545, Ordinance 12-0334.

<sup>42</sup> *Supp. Ex. 7, Lauri Anderson Declaration.*

<sup>43</sup> E843, E844.

1 Kenmore submitted its adopted SMP to Ecology on February 22, 2012. Pursuant to WAC  
2 173-26-120(7)(b)(ii), Ecology reviewed Kenmore's amendments and responses to all the  
3 required and recommended changes and concluded that the SMP was consistent with the  
4 policy of RCW 90.58.020 and applicable rules.<sup>44</sup> On March 16, 2012, Ecology issued its  
5 Final Approval letter, giving approval of Kenmore's SMP Update and notice of the final  
6 action. The SMP became effective on March 30, 2012.<sup>45</sup>  
7

8 On June 4, 2012, Petitioners filed a Petition for Review (PFR) with the Growth Management  
9 Hearings Board appealing "the updated Kenmore Shoreline Master Program as adopted by  
10 Ordinance No. 12-0334 and approved by Ecology in its March 16, 2012, letter."  
11

## 12 **V. LEGAL ISSUES AND DISCUSSION**

### 13 **A. Scope of the PFR**

14 The Petition for Review and each legal issue as stated by Petitioners challenge  
15 . . .the updated Kenmore Shoreline Master Program, as adopted by Ordinance  
16 12-0334 and approved by Ecology with its March 16, 2012 letter. . . .  
17

18 The PFR does not expressly reference Ordinance No. 10-0312, which adopted the City's  
19 Sub-Element of the Comprehensive Plan relating to shoreline policies and the restoration  
20 plan.<sup>46</sup> In their briefing, however, Petitioners specifically challenge the SMP policies and  
21 restoration plan which were adopted in Ordinance 10-0312, not in Ordinance 12-0334. The  
22 City and Ecology ask the Board to disregard challenges to the policies and restoration plan,  
23 the City noting Ordinance 10-0312 was adopted in 2010 and a PFR now would be  
24 untimely.<sup>47</sup>  
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29 <sup>44</sup> C345, at 2.

30 <sup>45</sup> *Id.*

31 <sup>46</sup> See Petition for Review, filed with the Board on June 4, 2012, and Amended Petition for Review, filed with  
the Board on July 3, 2012.

32 <sup>47</sup> City Brief, at 6. The Board notes, however, that pursuant to WAC 173-26-120(7)(b)(ii) Ordinance 10-0312  
was not effective and could not have been challenged until after final approval of the SMP by Ecology on  
March 16, 2012.

1 The Board notes Kenmore's SMP Update was first adopted September 13, 2010 in two  
2 ordinances:

- 3 • Ordinance 10-0312 contained the SMP policies as a sub-element of the  
4 comprehensive plan, along with the restoration plan.
- 5 • Ordinance 10-0313 contained the SMP regulations. Ecology remanded the  
6 regulation to the City, which adopted revised regulations in Ordinance 12-0334.

7  
8 Ecology's Final Approval letter on March 16, 2012, approved the Kenmore Comprehensive  
9 Shoreline Master Program Update saying:<sup>48</sup>

10 Upon review, Ecology finds the City's alternative provisions and additional  
11 minor changes proposed in Ordinance 12-0334 to be consistent with the  
12 purpose and intent of the changes originally proposed by Ecology and with the  
13 policy of RCW 90.58.020 and applicable rules.

14 Ecology therefore approves the City's SMP comprehensive update, together  
15 with the revisions specified above. This action represents Ecology's final  
16 decision....

17 Pursuant to WAC 173-26-120(7)(b)(ii), the effective date of the approved master program is  
18 the date of Ecology's Final Approval letter. The Final Approval letter for the Kenmore SMP  
19 never points out that Ordinance 12-0334 is a correction only for Ordinance 10-0313, not 10-  
20 0312. Nor does the letter indicate the "City's SMP comprehensive update" encompasses  
21 Ordinance 10-0312 as well as 12-0334. Rather, Petitioners would reasonably conclude  
22 Ordinance 12-0334 constitutes the "City's SMP comprehensive update" referenced in the  
23 Final Approval letter.  
24

25  
26 The Board finds the PFR language challenging "the updated Kenmore Shoreline Master  
27 Program, as adopted by Ordinance 12-0334 and approved by Ecology with its March 16,  
28 2012 letter," is sufficient to encompass all the updated SMP that Ecology approved with its  
29 Final Approval, including the policies and plans contained in Ordinance 10-0312. Ecology's  
30  
31  
32

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<sup>48</sup> C345 at 2.

1 Final Approval letter pointed to Ordinance 12-0334, and the Board will not penalize these  
2 Petitioners for Ecology's imprecision.

### 3 4 **B. Assembly of Required Scientific Data**

5 *Is there clear and convincing evidence that Kenmore's SMP was flawed because*  
6 *neither the inventory nor cumulative impacts analysis included the October 6, 2011,*  
7 *Harbor Village Marina dredge report or other indicia of the extent of toxins in the*  
8 *shoreline environment?*

### 9 ***Inclusion of Harbour Village Marina Dredge Report***

10 Legal Issue 2 alleges an improper failure to consider and include the sediment analysis  
11 contained in the Harbour Village Marina dredge report in the Kenmore SMP update. Legal  
12 Issue 2 is set forth as follows:

- 13  
14 2. *No Net Loss of Ecological Functions and Processes.* Does the updated Kenmore  
15 Shoreline Master Program, as adopted by Ordinance 12-0334 and approved by  
16 Ecology with its March 16, 2012 letter, fail to comply with the Shoreline  
17 Management Act, RCW 90.58.020 and 90.58.100(1), and the Shoreline Master  
18 Program Guidelines, WAC 173-26-186(8),<sup>49</sup> 173-26-201(2), and 173-26-201(3),  
19 and, the Growth Management Act, RCW 36.70A.020(10) and RCW 36.70A.172,  
20 because the City of Kenmore and the Department of Ecology **failed to**  
21 **incorporate new information pertaining to contaminants, including high**  
22 **dioxin levels being detected during activities occurring within the shoreline**  
23 **area**, when performing and analyzing the shoreline update and, this omission  
24 results in a failure to protect the ecological functions and processes of the  
25 shorelines from no net loss based on the best available scientific information?  
(Strike-through indicates abandoned issues.)

### 26 Applicable Law

27 To provide the scientific foundation for shoreline master program updates, RCW  
28 90.58.100(1) requires local governments, "to the extent feasible," to:

- 29 (a) Utilize a systematic interdisciplinary approach which will insure the  
30 integrated use of the natural and social sciences and the environmental  
31 design arts;

32  

---

<sup>49</sup> Compliance with WAC 173-26-186(8) is addressed in Legal Issue 5.

1  
2 (b) Consult with and obtain the comments of any federal, state, regional, or  
3 local agency having any special expertise with respect to any environmental  
4 impact;

5 (c) Consider all plans, studies, surveys, inventories, and systems of  
6 classification made or being made by federal, state, regional, or local  
7 agencies, by private individuals, or by organizations dealing with pertinent  
8 shorelines of the state;

9 (d) Conduct or support such further research, studies, surveys, and  
10 interviews as are deemed necessary;

11 (e) Utilize all available information regarding hydrology, geography,  
12 topography, ecology, economics, and other pertinent data;

13 (f) Employ, when feasible, all appropriate, modern scientific data processing  
14 and computer techniques to store, index, analyze, and manage the  
15 information gathered.

16 The SMP guidelines at WAC 173-26-200(2)(a) provide:<sup>50</sup>

17  
18 To satisfy the requirements for the use of scientific and technical information in  
19 RCW 90.58.100(1), local governments shall incorporate the following two steps  
20 into their master program development and amendment process:

21 First, identify and assemble the most current, accurate, and complete scientific  
22 and technical information available that is applicable to the issues of concern.  
23 The context, scope, magnitude, significance, and potential limitations of the  
24 scientific information should be considered. At a minimum, make use of and,  
25 where applicable, incorporate all available scientific information, aerial  
26 photography, inventory data, technical assistance materials, manuals and  
27 services from reliable sources of science. Local governments should also  
28 contact relevant state agencies, universities, affected Indian tribes, port districts  
29 and private parties for available information. While adequate scientific  
30 information and methodology necessary for development of a master program  
31 should be available, if any person, including local government, chooses to  
32 initiate scientific research with the expectation that it will be used as a basis for  
master program provisions, that research shall use accepted scientific methods,  
research procedures and review protocols. Local governments are encouraged

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<sup>50</sup> Emphasis added.



1 to work interactively with neighboring jurisdictions, state resource agencies,  
2 affected Indian tribes, and other local government entities such as port districts  
3 to address technical issues beyond the scope of existing information resources  
4 or locally initiated research.

5 Local governments should consult the technical assistance materials produced  
6 by the department. When relevant information is available and unless there is  
7 more current or specific information available, those technical assistance  
8 materials shall constitute an element of scientific and technical information as  
9 defined in these guidelines and the use of which is required by the act.

10 Second, base master program provisions on an analysis incorporating the most  
11 current, accurate, and complete scientific or technical information available.  
12 Local governments should be prepared to identify the following:

13 (i) Scientific information and management recommendations on which the  
14 master program provisions are based;

15 (ii) Assumptions made concerning, and data gaps in, the scientific  
16 information; and

17 (iii) Risks to ecological functions associated with master program provisions.  
18 Address potential risks as described in WAC 173-26-201(3)(d).

19 Ecology's guidelines also recommend that local inventories include the following  
20 information, WAC 173-26-201(3)(c)(i)-(xi).<sup>51</sup>  
21

22 (c) **Inventory shoreline conditions.** Gather and incorporate all pertinent and  
23 available information, existing inventory data and materials from state and  
24 federal agencies, individuals and nongovernmental entities with expertise,  
25 affected Indian tribes, watershed management planning, port districts and other  
26 appropriate sources. Ensure that, whenever possible, inventory methods and  
27 protocols are consistent with those of neighboring jurisdictions and state efforts.  
28 The department will provide, to the extent possible, services and resources for  
29 inventory work. Contact the department to determine information sources and  
30 other relevant efforts. Map inventory information at an appropriate scale. The  
31 department may provide an inventory of shoreline conditions to the local  
32 jurisdiction.

---

<sup>51</sup> Emphasis added.

1 Local government shall, at a minimum, and to the extent such information is  
2 relevant and reasonably available, collect the following information:

3 (i) Shoreline and adjacent land use patterns and transportation and utility  
4 facilities, including the extent of existing structures, impervious surfaces,  
5 vegetation and shoreline modifications in shoreline jurisdiction. Special attention  
6 should be paid to identification of ecologically intact blocks of upland vegetation,  
7 developed areas with largely intact riparian vegetation, water-oriented uses and  
8 related navigation, transportation and utility facilities.

9 (ii) Existing aquatic and terrestrial wildlife habitats; native aquatic vegetation;  
10 riparian and associated upland plant communities; and critical areas, including  
11 wetlands, aquifer recharge areas, fish and wildlife habitat conservation areas,  
12 geologically hazardous areas, and frequently flooded areas. See also WAC  
13 173-26-221.

14 (iii) Altered and degraded areas and sites with potential for ecological  
15 restoration.

16 (iv) Areas of special interest, such as priority habitats, ecologically intact late  
17 successional native plant communities, developing or redeveloping harbors and  
18 waterfronts, previously identified toxic or hazardous material clean-up sites,  
19 dredged material disposal sites, or eroding shorelines, to be addressed through  
20 new master program provisions.

21 (v) Conditions and regulations in shoreland and adjacent areas that affect  
22 shorelines, such as surface water management and land use regulations. This  
23 information may be useful in achieving mutual consistency between the master  
24 program and other development regulations.

25 (vi) Existing and potential shoreline public access sites, including public  
26 rights of way and utility corridors. . .

27 (viii) Gaps in existing information. During the initial inventory, local  
28 governments should identify what additional information may be necessary for  
29 more effective shoreline management. . .

30 (xi) Information specific to the aquatic environment for siting in-water uses  
31 and development, such as sediment contamination, intertidal property  
32 ownership, aquaculture operations, shellfish beds, shellfish protection districts,  
and areas that meet department of health shellfish water quality certification  
requirements.

1 Positions of the Parties

2 Petitioners assert the evidence of high dioxin levels in Lake Washington sediments along  
3 the Downtown Waterfront, disclosed in the Harbour Village Marina dredge report, must be  
4 incorporated into the Kenmore SMP update in order to provide a proper baseline for the  
5 protection of shoreline ecological functions. They argue the sediment analysis for Harbour  
6 Village Marina was available in October 2011, months before final approval of the Kenmore  
7 SMP update. With due diligence, Ecology or the City should have been aware of these  
8 results, Petitioners contend. They allege that despite active urging of Petitioners and other  
9 citizens throughout the SMP process, the City failed to rigorously investigate the nature and  
10 extent of downtown shoreline contamination.<sup>52</sup>  
11

12  
13 The City and Ecology assert the Kenmore shoreline inventory was completed in 2010 and  
14 the submittal was verified as complete by Ecology on February 11, 2011.<sup>53</sup> The Harbour  
15 Village Marina dredge report was not issued until October 6, 2011. The City argues the  
16 dredge report data is not required to be included in its SMP inventory because it was not  
17 “available” or “existing” when the inventory was developed:  
18

19       The guidelines consistently use the word "available," which means that local  
20       governments may gather and use existing research in their update  
21       preparation.<sup>54</sup>

22 The City states its inventory properly identifies contamination in the Downtown Waterfront,  
23 with special focus on the LakePointe site.<sup>55</sup> The City cites multiple references to pollutants,  
24 including dioxin, in the Inventory and Cumulative Impacts Analysis.<sup>56</sup> Responding to  
25 Petitioners’ and Intervenor’s demands for additional tests, the City points out:  
26  
27  
28  
29

30 <sup>52</sup> Petitioners’ Prehearing Brief, at 9-11.

31 <sup>53</sup> C320.

32 <sup>54</sup> City Brief at 19.

<sup>55</sup> *Id.* at 14-18.

<sup>56</sup> See generally City Brief at 15-19, summarizing relevant information in Inventory.

1 WAC 173-26-201(2)(a) does not mandate original research but expressly gives  
2 local governments the option to initiate original scientific research if they so  
3 choose.<sup>57</sup>

4 Finally, the City argues that to propose the City “stop its shoreline update process and  
5 incorporate new information years after an inventory is completed” would conflict with  
6 statutory deadlines imposed by RCW 90.58.080 and Ecology’s review process timelines  
7 under WAC 173-26-120(7)(b)(ii).<sup>58</sup>  
8

9 Ecology concurs with the City, adding that the planning timeline for the SMP process did not  
10 authorize Ecology to halt the planning process after initial approval to incorporate a new  
11 study into the inventory.<sup>59</sup> Ecology points out Kenmore’s SMP submittal was deemed  
12 complete on February 11, 2011 and finalized by City Council vote a year later on February  
13 13, 2012. At that point, Ecology was required to act on the Kenmore SMP pursuant to WAC  
14 173-26-120(7)(b)(ii), judging the City’s action against Ecology’s prior comments, not  
15 introducing new considerations.  
16

17  
18 Further, Ecology reasons that Kenmore’s SMP Inventory, Revised Cumulative Impacts  
19 Analysis, and Restoration Plan already included significant information about contamination  
20 of Downtown Waterfront shorelines:

21 In Kenmore’s case, the planning documents already indicated that the shoreline  
22 was a highly modified industrial shoreline, and contaminants were noted to be  
23 of concern. The dredge material report information did not necessitate calling a  
24 halt to the planning update.<sup>60</sup>

25 Finally, Ecology argues administrative efficiency requires a cut-off date for incorporating  
26 new data in an SMP update, pointing out the seven-year SMP review and update cycle of  
27 RCW 90.58.080 provides assurance that emerging information will not be ignored.  
28

29  
30 <sup>57</sup> *Id.* at 11.

31 <sup>58</sup> City Brief, at 20.

32 <sup>59</sup> Ecology Brief, at 10.

<sup>60</sup> *Id.*, referring to the Harbor Village Marina sediment analysis as “identification of an additional contaminant in an already-impaired shoreline.”

1 Board Discussion and Analysis

2 RCW 90.58.100 sets a high standard for scientific analysis of local shoreline conditions on  
3 which shoreline master programs are to be based. However, the statutory provisions and  
4 the implementing guidelines expressly recognize limits to the feasibility of data collection.  
5 WAC 173-26-200(2)(a) requires two steps in local use of technical information as a basis for  
6 SMP update. First, the city must **compile** the “most current” “available” information. The city  
7 may choose to initiate scientific research, but original research is not mandated. Second,  
8 the city must base its SMP on **analysis** of the “most current, accurate, and complete  
9 scientific or technical information available.” The city must be prepared to identify data gaps  
10 in the scientific information.  
11

12  
13 WAC 173-26-201(3)(c) describes the required inventory of shoreline conditions, again  
14 referring to “existing” data and “available” information. The inventory must address known  
15 contamination and must include, “to the extent such information is relevant and reasonably  
16 available . . .”  
17

- 18 (iii) ... altered and degraded areas ...  
19 (iv) Areas of special interest, such as ... previously identified toxic or hazardous  
20 material clean-up sites ...  
21 (viii) Gaps in existing information ...  
22 (xi) Information specific to the aquatic environment ... such as sediment  
contamination.

23 Thus the SMP guidelines require a diligent review of “existing” reports and studies to inform  
24 the inventory and cumulative impacts analysis. The review must include the “most recent”  
25 information that is “available.” The Petitioners point out the inventory fails to identify dioxins  
26 as contaminants in waterfront sediments. Nor is this risk identified as a data gap. They  
27 argue the inventory must be amended to include this information. The Board is not  
28 persuaded.  
29

30  
31 The Board notes Kenmore’s SMP inventory documented water quality impairment in the  
32 Downtown Waterfront area by reviewing data from monitoring stations in north Lake

1 Washington near Kenmore (showing high levels of PCBs and phosphorus)<sup>61</sup> and near the  
2 mouth of the Sammamish River (arsenic, metals, phthalates).<sup>62</sup> The soil and groundwater  
3 contamination at LakePointe, a “previously identified toxic or hazardous material clean-up  
4 site,” was also specifically called out in the inventory (diesel, heavy oil, arsenic, lead,  
5 barium).<sup>63</sup> Concern regarding resuspension of contaminated sediments is included as a  
6 shoreline management issue as it relates to recreational use.<sup>64</sup>  
7

8 Given the Inventory’s unambiguous documentation of contamination in the Downtown  
9 Waterfront, the Petitioners have not proved by “clear and convincing evidence” that failure  
10 to include the October 6, 2011 Harbour Village Marina dredge report violated the SMA or  
11 the guidelines. The Inventory, Cumulative Impacts Analysis and Restoration Plan  
12 acknowledge the necessity to condition future development, dredging, and other soil or  
13 sediment disturbing activities based on site-specific information to ensure containment and  
14 clean-up of contamination.  
15  
16

17 The City completed its Inventory in 2010. The Inventory and other SMP submittals were  
18 reviewed by Ecology. After receiving requested additions, Ecology made a finding that the  
19 submittal was complete. Ecology’s Findings and Conclusions, issued July 25, 2011, state:  
20 “The SMP submittal was verified as complete on February 11, 2011.”<sup>65</sup> Between February  
21 and July, 2011, Ecology reviewed the SMP and issued its Conditional Approval July 25,  
22 2011, remanding the SMP to the City with a short list of required and recommended  
23 amendments. The City then developed amendments and alternatives responsive to  
24 Ecology’s instructions, which were adopted on February 13, 2012. Ecology issued its Final  
25 Approval letter March 16, 2012.  
26  
27  
28

29  
30 <sup>61</sup> E527, Inventory, at G-30, 48; see also *Supp. Ex. 6* at 1 (Map 1077)

31 <sup>62</sup> *Id.* at G-71-72, noting King County’s water quality index indicating “high concern” and Ecology’s TMDL  
listing.

32 <sup>63</sup> *Id.* at G-60, referencing the 2001 RI/FS.

<sup>64</sup> *Id.* at G-103.

<sup>65</sup> E599, at 2.

1 The Harbour Village Marina sediment analysis, meanwhile, was being conducted by a  
2 shoreline property owner to address US Army Corps of Engineers (Corps) requirements for  
3 dredging to replace piers. Samples were taken June 7, 2011, and the dredge report was  
4 issued October 6, 2011. The report was submitted to the City Council by petitioners on  
5 February 13, 2012.<sup>66</sup>  
6

7 The Board notes the time between a local jurisdiction's initial filing of SMP enactments and  
8 Ecology's Final Approval will be several months, at minimum, given the procedural  
9 requirements of the guidelines. Both the local jurisdiction and Ecology must have the  
10 flexibility to reconsider changes to the SMP if warranted by changed circumstances or newly  
11 discovered facts. However, the Board does not find in the guidelines any duty to revise the  
12 inventory to incorporate data that was not "existing," "available," or "the most current" at the  
13 time the completeness of the submittal was verified by Ecology.  
14  
15

16 The Board addressed a similar question in *Seattle Shellfish v. Pierce County & Ecology*.<sup>67</sup> In  
17 that case, geoduck farmers sought to introduce two Biological Opinions (BiOps) issued by  
18 NMFS and USFWS discussing impacts of geoduck aquaculture on salmon recovery. The  
19 Board found both BiOps were not issued until **after** Ecology issued its conditional approval  
20 for the Pierce County SMP amendment and therefore were not appropriate for  
21 supplementation of the record.<sup>68</sup>  
22  
23  
24

---

25 <sup>66</sup> *Supp Ex 7*, Lauri Anderson Declaration. The Board notes the dredge report may have been provided to the  
26 City and Ecology earlier as part of the permit application process, but neither agency noted the findings in its  
27 SMP review.

28 <sup>67</sup> CPSGMHB No. 09-3-0010, Order on Motions (October 3, 2009).

29 <sup>68</sup> The sequence was as follows:

30 June 3, 2008 – County adopts SMP amendments and forwards them to Ecology

31 June 30, and July 3, 2008 – NMFS and USFWS respectively receive Army Corps request for consultation  
32 which triggers BiOp preparation

Feb. 25, 2009 – Ecology issues conditional approval of County SMP amendment

Mar. 24, 2009 – USFWS issues BiOp

Apr. 21, 2009 – County adopts ordinance incorporating Ecology changes

Apr 28, 2009 – NMFS issues BiOp

May 18, 2009 – Ecology accepts County SMP amendment and issues Final Approval

1 In the present case the Harbour Village Marina sediment samples were taken June 7, 2011,  
2 while Ecology was completing its analysis of Kenmore's SMP, already verified as complete  
3 on February 11, 2011. Ecology issued its Conditional Approval July 25, 2011. The dredge  
4 report was issued October 6, 2011. The Board finds and concludes the information about  
5 dioxin levels in Downtown Waterfront sediments was not "available," "existing," or "most  
6 current" when Ecology's Conditional Approval was granted.  
7

8 Further, the dredge report demonstrates the effectiveness of Kenmore's SMP strategy for  
9 addressing data gaps. SMP Policy LU-21.1.5 anticipates the City's use of new information at  
10 the permit stage, which would include the City's use of "the most recent data regarding a  
11 cleanup site". The policy states:<sup>69</sup>  
12

13 Policy LU-21.1.5<sup>70</sup> Kenmore should seek and use any available monitoring  
14 data on shoreline conditions in regulating development and making decisions  
15 that affect shoreline use, including, but not limited to, water quality monitoring  
16 by King County and the Department of Ecology, and monitoring data from  
17 hazardous material cleanup sites. The most recent data regarding a cleanup  
18 site should be obtained prior to issuing any permits for development on such  
19 sites.

20 This policy acknowledges that current monitoring and other data should be sought and used  
21 in issuing permits or "making decisions that affect shoreline use." While the Inventory does  
22 not include the 2011 Harbour Village Marina dredge report, the City's SMP policies and  
23 regulations call for obtaining and using such data prior to issuing permits for new shoreline  
24 development. Thus data gaps are addressed on a permit-by permit basis so that the SMP  
25 does not become stale in the seven-year interval before the next update.  
26  
27  
28  
29  
30

31 <sup>69</sup> Emphasis added.

32 <sup>70</sup> Kenmore's Comprehensive Plan Sub-element containing Shoreline Master Program Goals and Policies was adopted as Ordinance 10-0312 and is found at E546, Ex. 1. In this Order, the Board cites the SMP Goals and Policies by their policy numbers without further reference to the Index or page number.



1 The Board concludes the Harbour Village Marina dredge report does not constitute clear  
2 and convincing evidence that the Kenmore SMP Inventory was incomplete or that the City's  
3 SMP violates WAC 173-26-200(2)(a) or .201(3)(c).

4  
5 Conclusion

6 The Board finds and concludes Petitioners have not met their burden of demonstrating non-  
7 compliance with RCW 90.58.100(1), WAC 173-26-200(2)(a) and .201(3)(c). Legal Issue 2 is  
8 dismissed.

9  
10 **C. No Net Loss, Optimal Implementation, and Restoration Planning**

11 *Is there clear and convincing evidence that allowance of continued industrial and*  
12 *high-intensity use violates the "no net loss," "optimum implementation," and*  
13 *restoration planning requirements of the SMA, given the presence of dioxins and*  
14 *other contaminants in the Downtown Waterfront?*

15  
16 **No Net Loss and Optimum Implementation**

17 **Legal Issue 5** alleges the Kenmore SMP fails to provide the higher level of effort required  
18 by statute for implementing SMA objectives in shorelines of statewide significance.

19 5. *Shorelines of Statewide Significance.* Does the updated Kenmore Shoreline  
20 Master Program, as adopted by Ordinance 12-0334 and approved by Ecology  
21 with its March 16, 2012 letter, fail to comply with the Shoreline Management Act,  
22 RCW 90.58.020, the Shoreline Master Program Guidelines, WAC 173-26-186(8),  
23 173-26-201(2), 173-26-201(3), and 173-26-251, because it lacks additional  
24 protection measures needed to adequately protect Shorelines of Statewide  
25 Significance, such as Lake Washington and the Sammamish River, especially  
when more intensive uses are proposed for these areas?

26 Applicable Law

27 WAC 173-26-186(8) states how the "no net loss" principle regarding protecting shoreline  
28 ecological systems is accomplished:<sup>71</sup>

- 29  
30 a) Local government is guided in its review and amendment of local master  
31 programs so that it uses a process that identifies, inventories, and ensures

32  

---

<sup>71</sup> Emphasis supplied.

1 meaningful understanding of current and potential ecological functions provided  
2 by effected shorelines.

3 b) Local master programs shall include policies and regulations designed to  
4 achieve no net loss of those ecological functions . . .

5 c) For counties and cities containing any impaired ecological functions, master  
6 programs shall include goals and policies that provide for restoration...

7  
8 d) Local master programs shall evaluate and consider cumulative impacts of  
9 reasonably foreseeable future development on shoreline ecological functions  
10 and other shoreline functions fostered by the policy goals of the act. To ensure  
11 no net loss of ecological functions and protection of other shoreline functions  
12 and/or uses, master programs shall contain policies, programs, and regulations  
13 that address adverse cumulative impacts and fairly allocate the burden of  
14 addressing cumulative impacts among development opportunities.

15 The SMA calls for higher levels of effort in implementing its objectives on shorelines of  
16 statewide significance. RCW 90.58.100(5) states:

17 The department shall approve those segments of the master program relating  
18 to shorelines of statewide significance only after determining the program  
19 provides the optimum implementation of the policy of this chapter to satisfy the  
20 statewide interest.

21 WAC 173-26-251(2) provides:

22 Optimum implementation involves special emphasis on statewide objectives  
23 and consultation with state agencies. The state's interests may vary, depending  
24 on the geographic region, type of shoreline, and local conditions. Optimum  
25 implementation may involve ensuring that other comprehensive planning  
26 policies and regulations support Shoreline Management Act objectives.

27 Because shoreline ecological resources are linked to other environments,  
28 implementation of ecological objectives requires effective management of whole  
29 ecosystems. Optimum implementation places a greater imperative on  
30 identifying, understanding and managing ecosystem-wide processes and  
31 ecological functions that sustain resources of statewide importance.  
32

1 Positions of the Parties

2 Petitioners assert the City could not reasonably protect ecological functions of the shoreline  
3 under a “no net loss” standard because “they never considered the effect of dioxins and  
4 other contaminants in the lake bed.”<sup>72</sup> Further, Petitioners argue, the City failed to make  
5 reasonable assumptions based on the evidence of past industrial uses.<sup>73</sup> Without an  
6 assumption of large-scale contamination in the downtown Lake Washington and  
7 Sammamish River reaches, the City could not have enacted proper policy to ensure no net  
8 loss of ecological functions, Petitioners contend. They point out, for example, that dioxins  
9 and PCBs generally remain in lakebed sediment until the sediment is disturbed. Disturbance  
10 causes toxins to become water-borne and ingested by fish and other creatures. Thus  
11 Petitioners assert the City failed to develop policies for the Downtown Waterfront that would  
12 minimize risks of sediment disturbance, opting instead for continued high-intensity and  
13 industrial uses.  
14

15  
16 Ecology responds that Kenmore’s SMP Inventory indeed considers the extent and impact of  
17 pollution, noting that contaminant input is one of the key management issues for the  
18 Downtown Waterfront Environment.<sup>74</sup> The Inventory acknowledges the presence of PCBs,  
19 metals and organic pollutants, hydrocarbons in soil and groundwater in the area, and the  
20 special problem of resuspension of contaminated sediments.<sup>75</sup> Kenmore’s shoreline  
21 development regulations ensure redevelopment of contaminated sites will meet no net loss  
22 requirements, according to Ecology:  
23

24       The SMP contains the flexibility to manage future development on a permit by  
25 permit basis, and permits for future development must be compliant with the  
26 SMA’s requirements for mitigation and no net loss.<sup>76</sup>  
27  
28  
29

30 <sup>72</sup> Petitioners’ Prehearing Brief at 15.

31 <sup>73</sup> *Id.*

32 <sup>74</sup> E527, Inventory, at G-100, G-114-15 (Table 5.1).

<sup>75</sup> Ecology Brief, at 12-14, citing E527, Inventory, at G-103.

<sup>76</sup> Ecology Brief, at 14, citing E545 at 56-59 (permit process).

1 Board Discussion and Analysis

2 In describing how the “no net loss” standard is to be incorporated into an SMP, WAC 173-  
3 26-186(8) calls for policies backed up by “regulations ... ensuring that each permitted  
4 development will not cause a net loss of ecological function of the shoreline.” For “any  
5 shorelines with impaired ecological function,” goals and policies must provide for restoration  
6 of the impaired function. And the “cumulative impact of reasonably foreseeable future  
7 development” must be evaluated and considered.  
8

9  
10 The Board has determined Kenmore’s Inventory identified the impaired ecological functions,  
11 including contamination, associated with past industrial practices in the Downtown  
12 Waterfront. The Board finds the Cumulative Impacts Analysis made reasonable projections  
13 concerning demand for continued water-related industrial and transportation use.<sup>77</sup> In  
14 general, the City determined new industrial uses were not likely, but the present uses were  
15 likely to continue and might possibly expand.<sup>78</sup>  
16

17 The Shoreline Management Act recognizes that accommodating water-dependent industrial  
18 and transportation facilities is an essential component of shoreline planning. RCW  
19 90.58.100 provides:  
20

- 21 (2) The master program shall include, when appropriate, the following:  
22 (a) An economic development element for the location and design of industries,  
23 transportation facilities, port facilities, tourist facilities, commerce and other  
24 developments that are particularly dependent on their location on or use of the  
25 shorelines of the state.

26 However, the Board notes Kenmore’s vision for its Downtown Waterfront designation does  
27 not promote industrial use.<sup>79</sup> The SMP provides: “The purpose of the Downtown Waterfront  
28 Environment is to provide for mixed urban water-enjoyment uses, public access and  
29  
30

31 <sup>77</sup> E528, Cumulative Impact Analysis, at 6 and 10-11. A King County foot ferry terminal is a possibility.

32 <sup>78</sup> *Id.* See also E527, Inventory at G-119: “It is not anticipated that there would be a large increase in water-  
dependent industrial uses in the area, but existing uses could seek to expand if allowed to do so.”

<sup>79</sup> See, City Brief at 30.

recreation while protecting existing ecological functions.” Numerous policies underscore the City’s rejection of industry and embrace of “water-enjoyment” uses.

- Policy LU-17.1.3 Redevelopment and renewal should be encouraged. . . .
- Policy LU-17.1.7 Encourage redevelopment of industrial sites into mixed urban uses, including public access, recreation, residential uses, and commercial uses.
- Policy LU-23-6.1 Kenmore will give preference to all other uses before industrial uses....
- Policy LU-23.6.4 Kenmore should prohibit new nonwater-oriented industrial development in the shoreline jurisdiction....

One policy, however, acknowledges the importance of locating water-dependent industrial or transportation facilities in Kenmore’s Downtown Waterfront.

- Policy LU-18.1.1 Kenmore should plan for the location and design of industries, industrial projects of statewide significance, transportation facilities, tourist facilities, commerce and other developments that are particularly dependent on their location on or use of the shorelines of the state.

Though industry is no longer a preferred use in the Downtown Waterfront designation, the SMP policies look to redevelopment of industrial sites as presenting key opportunities for environmental clean-up and restoration.

- Policy LU-23.6.3 Kenmore should encourage redevelopment, environmental cleanup and shoreline restoration on existing industrial sites.

Petitioners contend the hazards associated with designating contaminated areas for high-intensity industrial and commercial uses are ignored in the City’s plan. The Board, however, finds the SMP policies call for environmental cleanup and restoration of industrial sites when redeveloped, based on most-current monitoring data.

- Policy LU-17.1.5 Development should not cause adverse impacts to ecological functions. Any adverse impacts shall be mitigated. Where applicable, new development shall include environmental clean-up of the shoreline in accordance with relevant state and federal laws.
- Policy LU-21.1.5 Kenmore should seek and use any available monitoring data on shoreline conditions in regulating development and making decisions that effect shoreline use, including, but not limited to, water quality monitoring by King County and the Department of Ecology, and monitoring data from hazardous

1 waste cleanup sites. The most recent data regarding a cleanup site should be  
2 obtained prior to issuing any permits for development on such sites.

3 In addition to opportunities for clean-up with redevelopment, the City adopted the following  
4 policies to protect water quality:  
5

6 Goal 21.7 Prevent adverse impacts to water quality and storm water quantity  
7 that would result in a net loss of shoreline ecological functions or adverse  
8 impacts to aesthetic qualities or recreational opportunities.

9 Policy LU-21.7.1 Ensure consistency between shoreline management  
10 provisions and other regulations that address water quality and stormwater  
11 quality. The regulations that are most protective of ecological functions and  
12 public safety shall apply.

13 The SMP development regulations implement the “no net loss” commitment, with standards  
14 that focus on water quality. Kenmore’s General Shoreline Development Requirements at  
15 KMC 16.45.010 provide:  
16

17 A. Kenmore shall ensure that uses and modifications within the shoreline  
18 jurisdiction do not cause a net loss of shoreline ecological functions and  
19 processes. ...

20 B. All shoreline uses and developments shall be subject to the following  
21 general development standards:

22 1. The location, design, construction and management of all shoreline  
23 developments and uses shall protect the quality and quantity of surface and  
24 ground water on and adjacent to the lot and shall adhere to the guidelines,  
25 policies, standards and regulations of applicable water quality management  
26 programs and regulatory agencies. Best management practices such as  
27 fugitive dust controls and other good housekeeping measures to prevent  
contamination of land or water shall be required.

28 2. Solid and liquid wastes and untreated effluents shall not enter any bodies  
29 of water or be discharged onto the land.

30 3. Facilities, equipment and established procedures for the containment,  
31 recovery and mitigation of spilled petroleum products shall be provided at  
32 recreational marinas, commercial moorage, and vessel repair facilities.

1 4. The release of oil, chemicals or other hazardous materials onto or into the  
2 water shall be prohibited. Equipment for the transportation, storage, handling  
3 or application of such materials shall be maintained in a safe and leak proof  
4 condition. . . The use of chemicals to control invasive aquatic weeds is  
5 prohibited. . .

6 5. All shoreline developments and uses shall manage increases in surface runoff,  
7 and control, treat and release surface water runoff so that receiving water  
8 quality and shoreline properties and features are not adversely affected. . .

9 6. All shoreline developments and uses shall control erosion during project  
10 construction and operation . . .

11 9. All shoreline developments and uses shall be located, designed, constructed  
12 and managed in a manner that minimizes adverse impacts to surrounding  
13 land and water uses and is compatible with the affected area.<sup>80</sup>

14 The City's regulations also regulate dredging,<sup>81</sup> require shoreline buffers and setbacks on  
15 shorelines,<sup>82</sup> and provide for mitigation sequencing.<sup>83</sup>

16  
17 Ecology has concluded that these regulations provide Kenmore "the flexibility to manage  
18 future development on a permit by permit basis, and permits for future development must be  
19 compliant with the SMA's requirements for mitigation and no net loss."<sup>84</sup> Petitioners worry  
20 that the regulatory language is platitudinous, that there are no express prohibitions against  
21 remobilization of contaminants in soils or sediments, and that enforcement may not be  
22 rigorous. Petitioners' concerns, however, do not constitute the clear and convincing  
23 evidence required to find error in Ecology's approval of the SMP.  
24

25  
26 Ecology's Findings and Conclusions for the City of Kenmore Shoreline Master Program  
27 conclude that the SMP "contains sufficient policies and regulations to assure that no net  
28 loss of shoreline ecological functions will result from implementation of the new master  
29

30 <sup>80</sup> E545, Ord. No. 12-0334, *Ex. 1* at 20-21 (emphasis added).

31 <sup>81</sup> *Id. Ex. 1* at 46.

32 <sup>82</sup> *Id. Ex. 1* at 51-52, Shoreline Density and Dimensions Table.

<sup>83</sup> *Id. Ex. 1* at 2.

<sup>84</sup> Ecology Brief at 14, citing E545 at 56-59.

1 program amendments (WAC 173-26-201(2)(c)).<sup>85</sup> Ecology also concludes “that those SMP  
2 segments relating to shorelines of statewide significance provide for the optimum  
3 implementation of Shoreline Management Act policy (RCW 90.58.090(5)).”<sup>86</sup>  
4

5 The Board finds Petitioners have not met their burden of providing clear and convincing  
6 evidence that Ecology’s approval of the SMP fails to ensure “no net loss” of shoreline  
7 ecological functions and “optimum implementation” of the policy of the SMA.  
8

#### 9 Conclusion

10 The Board finds and concludes Petitioners have not met their burden of demonstrating non-  
11 compliance with RCW 90.58.020, WAC 173-26-186(8), 173-26-201(2), 173-26-201(3), and  
12 173-26-251(2). Legal Issue 5 is **dismissed**.  
13  
14

#### 15 ***Restoration/Mitigation and Cumulative Impacts***

16 **Legal Issue 3** alleges the Kenmore SMP lacks the required restoration program for  
17 LakePointe and other degraded areas. Legal Issue 3 states:  
18

- 19 3. *Restoration/Mitigation and Cumulative Impacts*. Does the updated Kenmore  
20 Shoreline Master Program, as adopted by Ordinance 12-0334 and approved by  
21 Ecology with its March 16, 2012 letter, fail to comply with the Shoreline  
22 Management Act, RCW 90.58.020, and the Shoreline Master Program Guidelines,  
23 WAC 173-26-186(8), 173-26-201(2), and 173-26-201(3),<sup>87</sup> ~~and the Growth~~  
24 ~~Management Act, RCW 36.70A.020(10), 36.70A.060, 36.70A.172,~~ because by  
25 failing to incorporate new information pertaining to contaminants, including high  
26 dioxin levels, the Kenmore Shoreline Master Program fails to contain an adequate  
27 restoration and/or mitigation plan to address past harms, cumulative impacts, and  
the potential future loss of ecological functions and processes within the  
shoreline? (Strike-through indicates abandoned issues.)

#### 28 Applicable Law

29 WAC 173.26.201(2)(f) provides the standards for shoreline restoration planning:  
30  
31

32 <sup>85</sup> E599, at 10.

<sup>86</sup> E599, at 11.

<sup>87</sup> WAC 173-26-186(8) is argued under Legal Issue 5 and WAC 173-26-201(3) is argued under Legal Issue 2.



1 [M]aster program shall include goals, policies and actions for restoration of  
2 impaired shoreline ecological functions. These master program provisions  
3 should be designed to achieve overall improvements in shoreline ecological  
4 functions over time, when compared to the status upon adoption of the master  
5 program....

6 Master program restoration plans shall consider and address the following  
7 subjects:

- 8 (i) Identify degraded areas, impaired ecological functions, and sites with  
9 potential for ecological restoration;
- 10 (ii) Establish overall goals and priorities for restoration of degraded areas and  
11 impaired ecological functions;
- 12 (iii) Identify existing and ongoing projects and programs that are currently being  
13 implemented, or are reasonably assured of being implemented (based on an  
14 evaluation of funding likely in the foreseeable future), which are designed to  
15 contribute to local restoration goals. . .
- 16 (v) Identify timelines and benchmarks for implementing restoration projects . . . .

17  
18 Positions of the Parties

19 Petitioners contend Kenmore's restoration plan is inadequate because it contains no  
20 required action to address the specific contamination known to be present in the Downtown  
21 Waterfront. WAC 173-26-201(2)(f) requires the restoration program to identify degraded  
22 areas and impaired ecological functions and establish overall goals and priorities for  
23 restoration. "Firm guidelines" for restoration are essential, Petitioners assert; the SMP  
24 "intent to begin a process of implementing a programmatic action" is insufficient.<sup>88</sup>  
25  
26 Kenmore responds that the "no net loss" principle is embedded in its shoreline policies,  
27 which call for environmental cleanup with redevelopment, and in its Restoration Plan.<sup>89</sup> The  
28 City also cites its development regulations, which enforce a "no net loss" standard for  
29  
30  
31

32 <sup>88</sup> Petitioners' Prehearing Brief at 21, citing E546, Ex. 3, Restoration Plan, at 33.

<sup>89</sup> City Brief at 23, citing LU-17.1.5, LU-21.1.5, and LU-23.3.

1 shoreline development and uses.<sup>90</sup> The City asserts that its policy to seek the most recent  
2 data concerning a cleanup site ensures that omission of the 2011 Harbour Village Marina  
3 dredge report from the 2010 Inventory does not negate the City's regulatory framework.  
4

5 Ecology provides additional explanation concerning the LakePointe property.<sup>91</sup> Ecology  
6 states the LakePointe cleanup is adequately incorporated in the SMP Inventory and  
7 Restoration Plan. Ecology explains LakePointe will undergo cleanup under a separate  
8 statutory scheme, involving an agreement between Ecology and the property owner to  
9 which the City is not a party. There is no required timeframe; when the property is ready for  
10 redevelopment, an extensive clean-up and/or restoration planning process will commence.<sup>92</sup>  
11

#### 12 Board Discussion and Analysis

13  
14 Kenmore's SMP Restoration Plan addresses the degraded condition of the Downtown  
15 Waterfront shorelines. The Plan calls for contamination clean-up and revegetation of  
16 industrial shorelines as they are redeveloped, preferably for mixed use. The Plan specifically  
17 identifies recommended restoration actions for the LakePointe property and Kenmore Air  
18 Harbor Marina in the Downtown Waterfront.<sup>93</sup> Softening hardened shorefronts, adding  
19 appropriate vegetation, and other riparian enhancement are the primary strategies  
20 proposed.  
21

22  
23 The Restoration Plan recognizes the need to deal with impaired water quality and  
24 contaminated sediments, identifying in particular "high phosphorus concentrations and  
25 PCBs."<sup>94</sup> Policy provisions concerning fill facilitate "cleanup and disposal of contaminated  
26 sediments as part of an interagency environmental clean-up plan."<sup>95</sup> Dredging restrictions  
27  
28

---

29  
30 <sup>90</sup> See, e.g., KCC 16.45.101(A) set forth above.

31 <sup>91</sup> Ecology Brief at 18.

32 <sup>92</sup> E546, Ex. 3, Restoration Plan, at 33.

<sup>93</sup> *Id.* Table 3 at 25-26.

<sup>94</sup> E546, Ex. 3, Restoration Plan, at 9.

<sup>95</sup> Policy LU-24.4.2 (3).

1 allow for projects associated with habitat restoration under MTCA or CERCLA – the state  
2 and federal regulatory schemes for clean-up of industrial contamination.<sup>96</sup>

3  
4 Petitioners decry the lack of specific targets and deadlines for clean-up of contamination.  
5 However, the SMA guidelines call for identification of projects that “are reasonably assured  
6 of being implemented” and where there is “funding likely in the foreseeable future.”<sup>97</sup> The  
7 Board notes much of the Downtown Waterfront shoreline is privately owned and already  
8 developed. The City’s restoration plan largely relies on property-owner redevelopment or  
9 site improvements which would trigger clean-up and restoration and ensure funding. While a  
10 more-aggressive strategy might be desirable, the City’s approach is not clearly erroneous.  
11

12 The Restoration Plan recognizes that the LakePointe clean-up is mandated under MTCA.  
13 With respect to issues of contamination, the imperatives of MTCA provide the necessary  
14 “firm guidelines” and certainty of implementation. The City’s additional restoration actions for  
15 the site address removal of impervious surface and shoreline armoring, removal of debris  
16 and derelict equipment, including submerged material, and restoring riparian vegetation.<sup>98</sup>  
17 The Restoration Plan acknowledges these additional actions require a stakeholder process  
18 and funding sources as yet unidentified.<sup>99</sup>  
19  
20

21 The Board finds Petitioners have failed to present clear and convincing evidence that  
22 Ecology’s approval of the Kenmore SMP Restoration Plan is inconsistent with WAC 173-26-  
23 201(f).  
24

## 25 Conclusion

26  
27 Petitioners have failed to present clear and convincing evidence that Ecology’s approval of  
28 the Kenmore SMP Restoration Plan is inconsistent with WAC 173-26-201(f). Legal Issue 3  
29

30  
31 <sup>96</sup> Policy LU-24.6.3. CERCLA is the Comprehensive Environmental Response, Compensation, and Liability Act  
of 1980, commonly known as Superfund.

32 <sup>97</sup> WAC 173-26-201(2)(f)(iii)

<sup>98</sup> E546, Ex. 3, Restoration Plan at 25, 28

<sup>99</sup> *Id.* at 33.

1 is dismissed.

2  
3 **D. Habitat Protection, Public Access and Public Health**

4 *Is there clear and convincing evidence that Kenmore's SMP fails to protect critical*  
5 *habitat, public access, and public health and safety, given the new evidence of*  
6 *contamination in the Downtown Waterfront?*

7 **Habitat Protection**

8 **Legal Issue 4** alleges the Kenmore SMP fails to protect habitat for fish and wildlife. Legal  
9 Issue 4 states:

10  
11 4 *Habitat Protection.* Does the updated Kenmore Shoreline Master Program, as  
12 adopted by Ordinance 12-0334 and approved by Ecology with its March 16,  
13 2012 letter, fail to comply with the Shoreline Management Act, RCW  
14 90.58.020, and the Shoreline Master Program Guidelines, WAC 173-26-  
15 186(8), 173-26-201(2), and 173-26-201(3), ~~and the Growth Management Act,~~  
16 ~~RCW 36.70A.020(10), 36.70A.060, 36.70A.172, and 36.70A.480,~~ because by  
17 promoting commercial, industrial, and/or manufacturing uses and by failing to  
18 incorporate information related to contaminants, such as dioxins, the Kenmore  
19 Shoreline Master Program fails to protect habitat vital to not only endangered  
20 aquatic species, such as Puget Sound Chinook Salmon, but also other  
21 aquatic, avian, and terrestrial species that utilize the shorelines for essential  
22 life functions? (Strike-through indicates abandoned issues.)

23 Positions of the Parties

24 Petitioners contend "the SMP as adopted by the City without considering data concerning  
25 Dioxins and PCBs detrimentally affects the habitat of species resident to Kenmore."<sup>100</sup>  
26 Citing WAC 173-26-221(6)(b), they argue SMPs are intended to protect against adverse  
27 impacts "to the land and its vegetation and wildlife, and to the waters of the state and their  
28 aquatic life" through preventing "impacts to water quality and storm water quantity that  
29 would result in a net loss of shoreline ecological functions, or a significant impact to  
30 aesthetic qualities, or recreational opportunities."

31  
32  

---

<sup>100</sup> Petitioners' Prehearing Brief, at 17.

1 Petitioners submit scientific articles documenting harm to salmon from dioxins and PCBs.<sup>101</sup>  
2 Specifically, Meador's studies find that Dioxin-like compounds can impair the immune  
3 system, inhibit growth, cause thymic atrophy and act as endocrine disruptors.<sup>102</sup> His studies  
4 found high levels of bioaccumulation in Chinook salmon, which use Lake Washington and  
5 the Sammamish River. Intervenor Hurst also writes eloquently about the deleterious results  
6 of circulation of dioxins and other pollutants through the web of aquatic, avian and terrestrial  
7 life.<sup>103</sup>  
8

9  
10 In response, Ecology asserts that the SMP appropriately incorporates Kenmore's critical  
11 areas ordinance (CAO) provisions for protection of "habitats of importance," and that the  
12 CAO satisfies shoreline requirements.<sup>104</sup>  
13

#### 14 Board Discussion and Analysis

15 Petitioners' brief does not frame the habitat protection argument around any of the SMA or  
16 guideline provisions listed in the issue statement - RCW 90.58.020, WAC 173-26-186(8),  
17 173-26-201(2), and 173-26-201(3). Thus, Petitioners fail to carry their burden of proof as to  
18 Legal Issue 4 and the issue may be deemed abandoned.  
19

20 Instead, Petitioners base their arguments on the provisions of WAC 173-26-221(6) which  
21 addresses water quality, storm water, and nonpoint pollution. While the habitat protection  
22 argument was not properly framed for the Board to decide, the Board notes neither the City  
23 nor Ecology disputes the harmful effect to salmon and other aquatic life from dioxins, PCBs  
24 and other contaminants identified in the Inventory. Rather, the Respondents point to  
25 provisions in the SMP incorporating the City's critical areas ordinance (CAO) which contains  
26 protections for fish and wildlife critical habitat areas.  
27  
28

29  
30 <sup>101</sup> See Meador, *Use of tissue and sediment-based threshold concentrations of PCBs to protect salmonids*  
31 *listed under the US Endangered Species Act* and Meador, *Bioaccumulation of PCBs in juvenile Chinook*  
32 *salmon outmigration through a contaminated urban estuary*.

<sup>102</sup> Meador, *Bioaccumulation* at 150.

<sup>103</sup> Intervenor Prehearing Brief.

<sup>104</sup> WAC 173-26-191 provides that shoreline master programs may incorporate CAO provisions by reference.

1 The SMP provides:

- 2 • Goal 21.5. Kenmore shall ensure protection of critical freshwater habitat consistent  
3 with Kenmore critical area regulations for fish and wildlife habitat of importance.  
4 KMC 18.55.520 and 18.55.530.
- 5 • Policy LU-21.5.2. Uses and development within and along stream channels,  
6 associated channel migration zones, wetlands, lake shorelines, and floodplains within  
7 the shoreline jurisdiction should be regulated to ensure no net loss of ecological  
8 processes and functions results from new development ...
- 9 • Policy LU-21.5.3 Kenmore shall protect ecological functions associated with critical  
10 freshwater habitat as necessary to ensure no net loss from shoreline activities and  
11 associated changes.

12 The SMP Policies concerning the Aquatic Environment designation similarly provide:

- 13 • LU-17.5.5 Uses that adversely affect the ecological functions of critical  
14 freshwater habitats should not be allowed except where necessary to achieve  
15 the objectives of RCW 90.58.020 and impacts should be mitigated.

16 The SMP General Shoreline Development Requirements include:

- 17 • KMC 16.45.010 (7) All shoreline developments and uses shall be located,  
18 designed, constructed and managed to avoid disturbance of, or minimize  
19 adverse impacts to protect fish and wildlife habitat conservation areas,  
20 including, but not limited to, spawning, nesting, rearing and habitat areas, and  
21 migratory routes. Where avoidance of adverse impacts is not practicable, the  
22 director may require that mitigation measures to protect species and habitat  
23 functions be developed in consultation with state resource management  
24 agencies and federally recognized tribes.<sup>105</sup>

25 SMP Goal 21.5 specifically references KMC 18.55.520 and 18.55.530, which are the  
26 performance standards for habitats of importance in Kenmore's CAO.<sup>106</sup> The code requires  
27 that "all activities, uses and alterations proposed to be located in water bodies used by  
28 anadromous fish or in areas that affect such water bodies shall give special consideration to  
29 the preservation and enhancement of anadromous fish habitat." KMC18.55.530(C)(1). A  
30 habitat management plan, developed in consultation with Washington Department of Fish  
31

32 <sup>105</sup> E545, Ex. 1, at 20.

<sup>106</sup> E545, App. 1, CAO.

1 and Wildlife and using best available science, is required for any proposed development in a  
2 habitat of importance. KMC 18.55.520(A)(1) and (F). Activities on land adjacent to habitats  
3 of importance to endangered or threatened fish require a critical areas report by a qualified  
4 professional and consultation with WDFW and the appropriate federal agency. KMC  
5 18.55.530(A)(2). Any activity or alteration in water bodies used by anadromous fish or on  
6 adjacent land must be "designed so that it will provide an overall improvement in the  
7 functions or values of the fish habitat or other critical areas." KMC 18.55.530(C)(1)(c).  
8

9  
10 The Board concurs with Petitioners that the new data concerning dioxin levels in Harbour  
11 Village Marina sediments is significant. Habitat management plans and critical areas reports  
12 for activities in the Downtown Waterfront will have to take the study into consideration. But  
13 Petitioners have not demonstrated that this additional knowledge renders the SMP policies  
14 and regulations inadequate to protect critical aquatic and shoreline habitat.  
15

#### 16 Conclusion

17 Petitioners have failed to provide clear and convincing evidence that Ecology's approval of  
18 the Kenmore SMP violates requirements to protect vital fish and wildlife habitats. Legal  
19 Issue 4 is **dismissed**.  
20

#### 21 ***Public Access and Health and Safety***

22  
23 **Legal Issues 6 and 7** allege the Kenmore SMP fails to incorporate consideration of public  
24 use of the shoreline or provide adequate protection for health and safety given the presence  
25 of contaminants. Legal Issues 6 and 7 state:

- 26       6. *Public Recreational Use*. Does the updated Kenmore Shoreline Master Program,  
27 as adopted by Ordinance 12-0334 and approved by Ecology with its March 16,  
28 2012 letter, fail to comply with the Shoreline Management Act, RCW 90.58.020  
29 and 90.58.090, the Shoreline Master Program Guidelines, WAC 173-26-186(8),  
30 173-26-201(2), and 173-26-201(3), because it fails to incorporate consideration of  
31 the public's use of the shoreline areas for recreational purposes given the  
32 presence of contaminants?

1 7. *Public Health*. Does the updated Kenmore Shoreline Master Program as adopted  
2 by Ordinance 12-0334 and approved by Ecology with its March 16, 2012 letter, fail  
3 to comply with the Shoreline Management Act, RCW 90.58.020, and the  
4 Shoreline Master Program Guidelines, WAC 173-26-186(8), 173-26-201(2), and  
5 173-26-201(3), because it fails to provide adequate protection against adverse  
6 impacts to the public health and safety?

6 Positions of the Parties

7 Petitioners contend the SMP does not protect the public health and safety of the citizens of  
8 Kenmore or others and does not responsibly address issues concerning public use.<sup>107</sup> They  
9 state SMPs are intended to protect against “adverse impacts to the public health” (WAC  
10 173-26-221(6)(b)) and to “regulate the design, construction and operation of permitted uses  
11 in the shorelines of the state to minimize, insofar as practical, interference with the public's  
12 use of the water.” WAC 173-26-221(4)(b)(iv).  
13

14  
15 Petitioners argue the City did not address concerns of public health and public access  
16 taking into consideration the sources and accumulation of dioxins, PCBs and other  
17 contaminants.<sup>108</sup> Petitioners assert industrial use makes it much more likely that the toxins  
18 found in the lake bed are disturbed, re-suspended in the waters, ingested by fish and by  
19 birds and people that eat the fish, or directly ingested by those who play or work on the lake  
20 shore. Intervenor Hurst adds her observations of contact with contaminated waters by  
21 toddlers playing on the beach, swimmers, fishers and boaters.  
22

23  
24 Ecology details the provisions in the Kenmore SMP concerning public access, including 20  
25 policies directed at 7 specific goals related to public access and enjoyment of the  
26 shoreline.<sup>109</sup> The SMP regulatory provisions “require public access to be conducted in a  
27 manner that is protective and safe,” says Ecology, pointing to KMC 16.50.060(A)(2) and  
28

29  
30 <sup>107</sup> Petitioners’ Prehearing Brief at 19-20.

31 <sup>108</sup> Petitioners offer: Gullett and Touati, *PCDD/F Emissions from Forest Fire Simulations* (2003) (dioxins  
32 created from burning biomass); Ryan, et al., *Investigation of the Pathways to PCDDs/Fs from an Ethylene  
Diffusion Flame* (2004) (fly ash as a potential source for the creation of dioxins).

<sup>109</sup> Ecology Brief, at 15-16, citing E546, *Ex. I* at 13-15.



1 (5)(2). Ecology contends the site-specific analysis required for any location where public  
2 access is planned ensures that the safety and health of the public will be protected.

3  
4 Board Discussion and Analysis

5 Petitioners' brief does not frame its public access and public health arguments around the  
6 SMA or guidelines provisions listed in the issue statements - RCW 90.58.020, RCW  
7 90.58.090, WAC 173-26-186(8), 173-26-201(2), and 173-26-201(3). Thus, Petitioners fail to  
8 carry their burden of proof as to Legal Issues 6 and 7 and these issues may be deemed  
9 abandoned.

10  
11 Instead, Petitioners base their arguments on provisions of WAC 173-26-221(6)(b) and WAC  
12 173-26-221(4)(b)(4). While the issues are not properly framed for the Board to decide, the  
13 Board has previously noted the City's vision for the Downtown Waterfront rejects industrial  
14 use in favor of "water-enjoyment" uses.<sup>110</sup> SMP Goal 19.1 Public Access provides:

15  
16 Increase the availability of the general public to reach, touch and enjoy the  
17 water's edge, to travel on the waters of the state and to view the water and the  
18 shoreline from adjacent locations. . . .

19 The SMP policies deal extensively with public access opportunities – shoreline trails,<sup>111</sup>  
20 viewpoints,<sup>112</sup> fishing piers,<sup>113</sup> restaurants and picnic areas.<sup>114</sup> In the shoreline, "recreational  
21 development should be given priority and is to be primarily related to access to and  
22 enjoyment and use of the water and shorelines of the state."<sup>115</sup> In the Downtown Waterfront,  
23 "[e]mphasis should be given to developing visual and physical public access to the  
24  
25  
26  
27  
28

29 <sup>110</sup> Policy LU-17.1: The purpose of the Downtown Waterfront Environment is to provide for mixed urban water-  
30 enjoyment uses, public access and recreation while protecting existing ecological functions.

31 <sup>111</sup> Policy LU-17.1.8, Policy LU-20.3.3.

32 <sup>112</sup> Policy LU-23.9.8, Policy LU-19.11.4.

<sup>113</sup> Policy LU-23.9.12, Policy LU-18.3.1.

<sup>114</sup> Policy LU-18.2.2, Policy LU-19.8.5.

<sup>115</sup> Policy LU-23.9.

shoreline.”<sup>116</sup> Trails are envisioned along the Downtown Waterfront as LakePointe, Kenmore Air Harbor, and other properties improve or redevelop.<sup>117</sup>

Petitioners argue the plans for public access are inconsistent with the requirement to protect public health, as the SMP does not take into consideration the presence of contaminants in soil and sediments. However, the Board finds the SMP development regulations allow the City flexibility to manage public access in the presence of contamination, because the regulations require public access to be sited to ensure public safety.<sup>118</sup> The requirements for permits for development ensure a site-specific analysis of any location where public access is planned and provide that the safety of the public be considered in any such development. If public access is infeasible due to incompatible uses or safety risks, it will not be provided.<sup>119</sup> Again, the Board finds the Harbor Village Marina dredge report serves as an example of site-specific analysis identifying a contamination risk and assuring appropriate management. The Board concludes Petitioners have failed to provide clear and convincing evidence that Ecology’s determination was in error.

### Conclusion

Petitioners have failed to carry their burden of demonstrating Kenmore’s SMP and its approval by Ecology violates SMA requirements to provide public access to shorelines while protecting human health and safety. Legal Issues 6 and 7 are **dismissed**.

## **VI. ORDER**

Based upon review of the Petition for Review, the briefs and exhibits submitted by the parties, the SMA and applicable guidelines, prior Board orders and case law, having considered the arguments of the parties and having deliberated on the matter, the Board

### **ORDERS:**

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<sup>116</sup> Policy LU-17.1.1.

<sup>117</sup> E527, Inventory at G-63-64, 79-80.

<sup>118</sup> E545, Ordinance 12-0334, Ex. 1 at 33, KMC 16.50.060(A)(2).

<sup>119</sup> *Id.* Ex. 1 at 34, KMC 16.50.060(F)(2).

- 1) Petitioners have failed to carry their burden of proof in demonstrating that the City of Kenmore's adoption and Ecology's approval of the Kenmore Shoreline Master Program update violated the policies of RCW 90.58.020 and the guidelines of WAC Chapter 173-26. Petitioners' issues alleging violation of the Shoreline Management Act are **dismissed**.
- 2) Petitioners **abandoned** their challenge to the Kenmore Shoreline Master Program Update for non-compliance with the Growth Management Act, RCW 36.70A.172, RCW 36.70A.060, RCW 36.70A.020 (10), and RCW 36.70A.480. Petitioners also abandoned Legal Issue 1. These issues are **dismissed**.
- 3) The matter of *Mooney et al v. City of Kenmore and Washington State Department of Ecology*, Case No. 12-3-0004, is **dismissed** and the case is **closed**.

Dated this 27th day of February, 2013.

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Margaret A. Pageler, Board Member

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Cheryl Pflug, Board Member

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Nina Carter, Board Member

**Note: This is a final decision and order of the Growth Management Hearings Board issued pursuant to RCW 36.70A.300.<sup>120</sup>**

<sup>120</sup> Should you choose to do so, a motion for reconsideration must be filed with the Board and served on all parties within ten days of mailing of the final order. WAC 242-3-830(1), -840.  
A party aggrieved by a final decision of the Board may appeal the decision to Superior Court within thirty days as provided in RCW 34.05.514 or 36.01.050. See RCW 36.70A.300(5) and WAC 242-03-970.  
It is incumbent upon the parties to review all applicable statutes and rules. The staff of the Growth Management Hearings Board is not authorized to provide legal advice.